79-1786

No.

Supreme Court, U.S.
FILED
MAY 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

TERM, 1980

EARL DAVID SHAFFER,

Petitioner-Appellant,

vs.

JAY R. BOND,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO REVIEW OKLAHOMA SUPREME COURT DECISIONS

EARL DAVID SHAFFER
709 N.W. 89th
Oklahoma City, Ok. 73114
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IN THE
SUPREME COURT OF THE UNITED STATES
TERM, 1980

No.

EARL DAVID SHAFFER,

Petitioner-Appellant,

vs.

JAY R. BOND,

Respondent-Appellee.

Petitioner hereby prays that a Writ of Certiorari issue to review the prejudicial orders and judgements of the SUPREME COURT OF OKLAHOMA.

OPINION BELOW

There is no reference to the order delivered by the Court below as it was stamped "NOT FOR PUBLICATION". The decision was obviously repugnant to too much law.

JURISDICTION

Juriscition of this Court is invoked pursuant to 28 U.S.C. § 1257. That specifically the United States Constitution Article Fourteen, Section One have been violated by the Oklahoma Courts. That the equal protection and due process clauses were timely and properly raised in the Courts below.

QUESTIONS FOR REVIEW

There are several laws that were disregarded by the

Courts below which are at issue and briefly stated as follows:

1. Whether the Oklahoma Courts can deny to this petitioner his right to equal protection and due process of the Oklahoma Case Law relating to the best interest and welfare of a child.

2. When a child is brought before the Oklahoma Court for determination of custody due to his health, safety, and welfare being in jeopardy, and the Court granted to this petitioner Temporary Custody of his child, was this custody order a lawful order to be respected and obeyed by the attorneys and the parties they represented.

3. Whether the Oklahoma case law and order that was signed by an Oklahoma County District Judge gave jurisdiction over custody of this petitioner's child because his health, safety, and welfare was in jeopardy.

4. Whether an attorney that violates his duty and gives unlawful advice to a client that they can be disobedient to a Court order and so damage a third party, is liable to said third party, for the resultant violent conspiracy, fraud and malpractice he committed.

5. Whether Oklahoma Courts can deny equal protection and due process of the tort statute and case law, the fraud case law, and the conspiracy and case law that in spirit and intent provide causes of action against the appellee.

6. Whether this petitioner is entitled to a trial by jury as a question of fact and not of law which shall remain inviolate as provided in the Oklahoma Constitution Article 2, Section 19.

7. Whether the Oklahoma Courts can so flagrantly ignore several United States Supreme Court decisions and the doctrine of Stare Decisis in a manner that is repugnant to said decisions.

8. Whether the State of Oklahoma can force a citizen to be subjected to a judge that has a prejudicial attitude in violation of the Oklahoma Constitution.

9. Whether an Oklahoma County District Court Judge committed prejudicial denial of due process of the law in violation of Oklahoma Statute Title 20, Section 106.4(a) and (b) that requires a Court reporter be provided upon request of any party and to transcribe the proceeding.

10. That the Oklahoma Court of Appeals opinion was not granted Certiorari by the Oklahoma Supreme Court. That said opinion is prejudicial since it mistates the actual facts of this case. The mistatement of the facts gives the appearance that the respondent committed no wrong and therefore has no liability. When the facts are stated correctly it shows the Respondent has committed legal malpractice, was a party to a conspiracy, and also perpetrated fraud against this petitioner's rights.

11. That the opinion by the Oklahoma Court of Appeals was prejudicial error. This error ws committed by following a previous decision of prejudicial error by the Oklahoma Supreme Court that has denied equal protection of the law and due process of the child welfare decisions. Thus, one prejudicial decision does not justify a second prejudicial decision.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Oklahoma Statutes Article 2, Section 6, Page 53 (1971)

2. Oklahoma Statutes Article 2, Section 19, Page 60 (1971)

3. Oklahoma Statutes Article 7, Section 8(d) Page 93 (1971)

4. Oklahoma Statutes Title 20, Section 106.4(a) and (b), Book 2, Page 1801

5. United States Constitution Article Fourteen, Section 1

6. Hollick v. McDaniel, Okl. (1965) 401 P.2d 466

7. Clampitt v. Johnson, Okl. (1961) 359 P.2d 588

8. Chivers v. Board of Commissioners, 62 Okl. 2, and 161 P. 822 at 824

9. Fisher v. Pace, 366 U.S. 155, 161-163

10. Gompers v. Bucks Stove and Range Co., 221 U.S. 418 at 450

11. United States v. United Mine Workers of America, 330 U.S. 258, 290-292, 293

12. Barsh v. Mullins, 338 P.2d 845, 847, 850, 855.

13. Thomas Fruit Co. v. Levergood, 135 Okl. 105.

See Appendix Exhibit G for pretinent text of the above law.

STATEMENT OF CASE

This petitioner had personal knowledge of his child being neglected and abused on several occasions. The appendix exhibit A is an example that shows how large ringworms had been allowed to grow on this young child without the needed care and treatment by his mother. An Orange County, Texas judge signed a Habeas Corpus order due to the pitiful medical condition that the child was in. That order required the Orange County, Texas sheriff to pick up the child from his mother and deliver him to this petitioner father.

That this petitioner then brought his child into the state of Oklahoma and before the jurisdiction of the Oklahoma County District Court which had previously granted the decree of divorce. That an order and journal entry dated Sept. 1974 was issued by an Oklahoma County District Judge (see exhibit B). This order specified and was issued due to the health, safety, and welfare of the child was in jeopardy. The order gave temporary custody of the child to this petitioner.

That a hearing was held on November 1, 1974 whereby the same custody order was continued in effect and this petitioner was to maintain custody of his child. All parties were physically in the state of Oklahoma for this hearing.

That shortly after the hearing on November 1, 1974, petitioner was exposed to a conspiratorial trap and scheme whereby his child was taken in a violent confrontation. The conspiracy was successful and the mother and her husband took the child from the state of Oklahoma and into the state of Texas in violation of the order.

Evidence shows that this conspiracy was a direct result of the unlawful advice of this respondent.

On May 6, 1975 an Oklahoma County District Judge signed an order directing the child's mother to produce the minor child of this petitioner on the ground that the defendant was neglecting and abusing the child.

The respondent then mislead the Oklahoma Supreme Court and obtained a Writ of Prohibition against the Oklahoma County District Court (exhibit C).

The Oklahoma Supreme Court Committed prejudicial error by signing the June 16, 1975 order. Said order completely ignored the child welfare case law that should have been applied to this case. This order has denied to this petitioner equal protection and due process of the child

welfare case law. That properly applied the Oklahoma Supreme Court would have ordered jurisdiction over the child.

The right to equal protection and due process of the law was initially stated in full by this petitioner in his brief that was filed before the Oklahoma County District Court. This Constitutional right was restated in subsequent briefs to the Oklahoma Supreme Court. This right was stated before the applicable case law and statutes. This Constitutional right was ignored by the Oklahoma courts as if it were not even the law. The briefs stated in full the United States Constitution Article Fourteen Section 1. The location of this quote was on the first page of the initial brief to the Oklahoma County District Court. It was again stated in the Brief in Chief that was filed before the Oklahoma Supreme Court at Page 1. Further argument in the briefs specifically amplified the right to equal protection and due process of the law.

The Oklahoma Courts did not comment on the United States Supreme Court decisions concerning jurisdiction and the duty to be obedient to a court order. The Oklahoma Courts also ignored the child welfare case law that should have been applied to this case. Their order mistated the law and said the custody order obtained by this petitioner was null and void. This is clearly not the law. It has never been the law that when a Court issues an order a person can be disobedient to the order and render it null and void. This is exactly what the Oklahoma Courts have allowed to occur with great prejudicial error against this petitioner's rights.

This case was filed against the respondent because of the unlawful advice he gave his client. The advice caused the disobedience of the custody order.

The Oklahoma Court of Appeals decision (exhibit D) mistates the law and facts of the case. The actual facts about the child abduction was stated to this Court and they denied rehearing the facts by order of December 18, 1979. The facts are obviously in error and prejudicial against this case (exhibit E).

The Oklahoma Supreme Court denied Certiorari by order dated February 11, 1980 (exhibit F).

ARGUMENT FOR ALLOWING WRIT

The appellate jurisdiction of this Court carries with it the responsibility to review and correct gross injustices when they occur. Gross injustice has occurred to this petitioner in the Courts below and is a bizarre description of the Oklahoma justice system. It would be a complete miscarriage of justice if this Court refused to review and then correct these injustices. This awesome responsibility must be accepted and dealt with honorably by this Court.

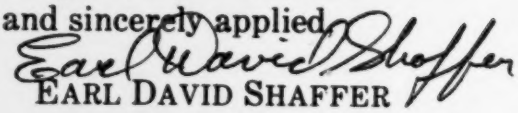
The Courts below have completely disregarded the law. Their decisions are repugnant to numerous laws briefly summarized:

1. Right to trial by jury
2. Equal protection and due process
3. Child welfare jurisdiction case law
4. Conspiracy, fraud, and tort injury law
5. Mistated the facts of this case
6. Repugnant to United States Supreme Court decisions
7. Repugnant to the Doctrine of Stare Decisis
8. Right to fair and impartial trial

This Court must allow Writ of Certiorari in order to vacate and set aside the orders of the Oklahoma Courts. Then remand the case with instructions that they follow

the law in spirit and intent.

Respectfully submitted
and sincerely applied,



EARL DAVID SHAFFER
709 N.W. 89th
Oklahoma City, Ok. 73114

APPENDIX

Exhibit A

Picture of the minor child showing neglected treatment of large ring worms.

Exhibit B

No. JFD 71-6248

IN THE
DISTRICT COURT IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

EARL DAVID SHAFFER,

Plaintiff,

vs.

SUE ALLEN SHAFFER,

Defendant.

ORDER AND JOURNAL ENTRY

Now on this 9th day of September, 1974, there comes on for hearing the verified petition and motion of the Plaintiff herein, together with certain Exhibits. The Court having read the petition, examined the Exhibits, being familiar with the file, and otherwise being fully advised in the premises, finds that this matter should be set down for hearing.

IT IS THEREFORE ORDERED that the motion for change of permanent custody of the child shall be heard before Wm. Kessler, Judge of this District Court, at the Court House in Oklahoma City, Oklahoma, at the hour of 1:30 p.m. o'clock, Nov. 1, 1974, and that until said time and hearing the Plaintiff is to have custody of the child and to be responsible for the medical

treatment of the child and the child's welfare. Plaintiff is permitted to take the child out of the State of Oklahoma for medical treatment or other legitimate reasons, but said child must be returned to the Court on the day of the hearing.

IT IS FURTHER ORDERED that a true and certified copy of this order shall be mailed to the Defendant at her last known address and to her attorney of record, certified mail, return receipt requested.

All parties shall govern themselves accordingly. Hereof failed not under penalty of law.

/s/ Ben LaFon
Judge of the District Court

APPENDIX

Exhibit C

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

No. 48,495

SUE ALLEN MAY,

Petitioner,

vs.

GAR GRAHAM, Associate District Judge of the District Court of Oklahoma County, Oklahoma,

Respondent.

ORDER

Upon consideration of Petitioner's Application to Assume Original Jurisdiction and for a Writ prohibiting the Respondent District Court from enforcing its order of May 6, 1975, directing Petitioner to appear with the minor, Earl David Shaffer, II, and answer Earl David Shaffer's Motion to Modify Divorce Decree as to custody of the minor child, said Application to Assume Jurisdiction and Petition for Writ of Prohibition are hereby granted due to lack of jurisdiction of Respondent over the minor child of the parties, who has not, since before the filing of the

original divorce action, been legally subject to the jurisdiction of the trial court; and Respondent Judge is hereby prohibited from conducting further proceedings in Cause No. JFD-71-6248. See *Bush v. Bush* (Okl. 1956), 299 P.2d 155.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th day of June, 1975.

/s/ Ben T. Williams
Chief Justice

APPENDIX

Exhibit D

October 30, 1979

NOT FOR PUBLICATION

IN THE
COURT OF APPEALS OF THE
STATE OF OKLAHOMA
(Division No. 1)

No. 52,111

EARL DAVID SHAFFER,

Appellant,

vs.

JAY R. BOND,

JAY R. BOND,

Appellee.

Appeal from the District Court of Oklahoma County, Oklahoma
Honorable Harold Theus, Judge

AFFIRMED

Earl David Shaffer
Oklahoma City, Oklahoma, Pro Se,

Foliart, Mills & Niemeyer
By: Earl D. Mills
Oklahoma City, Oklahoma, For Appellee.

REYNOLDS, J.:

Earl David Shaffer (Appellant) appeals the judgment of the trial court sustaining Jay R. Bond's (Appellee) motion for summary judgment in Appellant's suit for malpractice and conspiracy.

This suit arises out of Appellant's quest to obtain custody of his only child, Earl David Shaffer II, born March 4, 1969, from his ex-wife Sue Allen Shaffer (wife).

On January 18, 1972, Appellant was granted a divorce from wife. Custody of the minor child was placed in the wife who at the time lived in Texas with the minor child. In July 1974, Appellant obtained possession of the minor child, pursuant to a Writ of Habeas Corpus issued by the Orange County, Texas, Court, and immediately returned with the child to his home in Oklahoma City. [This Writ was set aside and held for naught three days after issuance.]

On September 9, 1974, Appellant obtained a temporary order from the District Court of Oklahoma County granting him custody when he filed a motion to modify the child custody provisions of the divorce decree. Wife hired Appellee to represent her in this matter. After the November 1, 1974, hearing on Wife's

plea to the jurisdiction of the court, Wife and her present husband saw the child in a hotel coffee shop, took possession of him, and the three then returned to Texas. Appellee had advised his client that she would not be violating the law nor subjecting herself to civil liability by doing so. On February 24, 1975, the District Court of Oklahoma County sustained Wife's objection to its jurisdiction and the temporary order was vacated.

On April 9, 1975, Appellant again filed a motion to modify the child custody provisions of the divorce decree. This time Wife's objection to jurisdiction was rejected and Wife sought a Writ of Prohibition. On June 16, 1975, the Oklahoma Supreme Court issued the Writ "due to lack of jurisdiction of Respondent over the minor child of the parties, who has not, since before the filing of the original divorce action, been legally subject to the jurisdiction of the trial court."

On October 26, 1976, Appellant filed the original Petition in this action. Appellant's Third Amended Petition was filed August 1, 1977, seeking to recover $10,158,800 in damages, alleging legal malpractice for the advice Appellee gave his client, and civil conspiracy to deprive Appellant of custody of the child. In effect, Appellant is suing Appellee, his ex-wife's attorney, for damages caused Appellant as the result of the advice and information that Appellee-attorney gave his client, Sue Allen Shaffer, in response to Wife's request for legal advice. On March 15, 1978, the trial court sustained Appellee's motion for summary judgment and entered judgment in Appellee's favor. Appellant has perfected this appeal.

It is not necessary that we consider the merits of Appellant's contentions concerning Appellee's alleged liability for legal malpractice in the situation above described. Appellant's entire case is based upon alleged violations of rights and duties Appellee owed Appellant pursuant to the September 9, 1974, temporary order awarding Appellant custody of the minor child as

subsequently reaffirmed by Judge Kessler on November 1, 1974. On February 24, 1975, the District Court of Oklahoma County sustained the objection to jurisdiction filed by Appellee in behalf of his client and the September 9, 1974, temporary order was vacated. On June 16, 1975, the Oklahoma Supreme Court held that the Oklahoma County District Courts had not had jurisdiction over the wife or the child "since before the filing of the original divorce action." A judgment or order rendered by a court without jurisdiction over the parties is void. *Kennedy v. Chadwell,* Okl., 215 P.2d 548 (1950). A void judgment or order is a nullity and cannot confer nor affect rights. *Beneficial Finance Co. of Tulsa v. Weiner,* Okl., 405 P.2d 691 (1965); *Chivers v. Board of Commissioners,* Okl., 161 P. 822 (1916).

The actions of Appellee violated no legally recognizable rights of Appellant. Therefore Appellee is entitled to summary judgment.

Appellant also contends that he was denied due process of law by the trial court denying his request for a court reporter. In an affidavit attached to his brief-in-chief, Appellant contends that at a January 9, 1977, hearing before District Judge Harold Theus, his request for a court reporter pursuant to Title 20 O.S. Supp. 1977, § 106.4(b) was denied. An examination of the appearance docket attached to the original record does not reveal a hearing being conducted on January 9, 1977. Appellee stated in his brief that the hearing complained of took place December 29, 1977.

Title 20 O.S. Supp. 1977, § 106.4 provided in part as follows:

> (a) The court reporter shall make a full reporting ... of all proceedings, including the statements of counsel and the court and the evidence, in trials and other judicial proceedings. ... A refusal of the court to permit or to require any statement to be taken down by the court reporter or transcribed after being taken down, upon the

> same being shown by affidavit or other direct and competent evidence, to the Supreme Court, or other appellate court, shall constitute a denial of due process of law. ... A trial or proceedings may proceed without the necessity of a court reporter being present, unless there is objection by a party or counsel. ....
>
> (b) Upon request of either party in a civil ... case the reporter shall transcribe the proceedings in a trial or other judicial proceeding, ...

In *Funnell v. Cannon,* Okl., 577 P.2d 1287, 1289 (1978), the Supreme Court said:

> To limit the right for the taking down by a court reporter to trial, or evidentiary hearings, would render the language "other judicial proceedings" idle and nugatory. A "judicial proceeding" cannot be limited to a trial or evidentiary hearing. It is correctly defined as "any proceeding wherein judicial action is invoked and taken"; or, "any step taken in a court of justice in the prosecution or defense of an action."
>
> Here, petitioners made a timely request for the taking down of statements of counsel and of the court in a judicial proceeding. That request was incorrectly denied by the trial court. That refusal, presently before us for review, constitutes a denial of due process of law. § 106.4(a).

Appellant's affidavit states that he made a timely request for a court reporter to make a full reporting of the December 29, 1977, hearing. His request was denied by the trial court. We decline to do the vain and useless act of remanding this action to the trial court for new proceedings when Appellant seeks to enforce rights based upon a void order.

Appellant's request for oral argument is denied.

AFFIRMED.

ROMANG, P.J. and BOX, J. concur.

APPENDIX

Exhibit E

IN THE
COURT OF APPEALS OF THE
STATE OF OKLAHOMA
(Division No. 1)

December 18, 1979

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

52,111 - Earl David Shaffer, Appellant v. Jay R. Bond, Appellee. PETITION FOR REHEARING DENIED.

/s/ Richard E. Romang
Presiding Judge

APPENDIX

Exhibit F

IN THE
SUPREME COURT OF THE
STATE OF OKLAHOMA

Monday, February 11, 1980

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

52,111 - Earl David Shaffer v. Jay R. Bond. Certiorari denied.

/s/ Robert E. Lavender
Chief Justice

APPENDIX

Exhibit G
Text of Law

---

1. Oklahoma Constitution Article 2, Section 6 § 6. Court of Justice open — Remedies for Wrongs - Sale, denial or delay. — The Courts of justice shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

2. Oklahoma Constitution Article 2, Section 19. § 19. Trial by jury. — The right to trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Hundred Dollars ($100.00), or in criminal cases wherein punishment for the offense charged is by fine only, not exceeding One Hundred Dollars ($100.00).

3. Oklahoma Constitution Article 7, Section 8(d) § 8(d) ... The District Judges and Associate District Judges shall exercise all jurisdiction in the District Court except as otherwise provided by law.

4. Oklahoma Statute Title 20, Section 106.4(a) § 106.4(a) ... A refusal of the Court to permit or to require any statement to be taken down by the Court reporter or transcribed after being taken down, upon the same being shown by affidavit or other direct and competent evidence, to the Supreme Court, or other Appellate Court, shall constitute a denial of due process of law.

5. United States Constitution Article Fourteen, Section 1. § 1 ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

6. *Hollick vs. McDaniel* (1965) 401 P.2d 466 Syllabus by the Court.
   1. As a matter of comity, if a court of a sister state enters a valid and binding order or judgment concerning the custody of a child, and the child is brought into this state in derogation of such order or judgement, the Courts of this state should not assume or exercise jurisdiction to relitigate the question of custody, unless the welfare of the child is in jeopardy or some other unusual circumstances exists.

7. *Clampitt v. Johnson,* 359 P.2d 588, 591, 594.
   Therefore, if an application for modification of a divorce decree should affirmatively show that the welfare of the child is in jeopardy or some other unusual circumstance exists, the courts of this state should assume jurisdiction to determine the application on its merits instead of refusing to take jurisdiction, as a matter of comity.

8. *Chivers v. Board of Commissioners,* 62 Okl. 2, 161 P.822 at 824.
   Jurisdiction, said this Court in *Jefferson v. Gallagher,* supra, is based upon three things: (1) Jurisdiction of the parties; (2) jurisdiction of the general subject matter; (3) jurisdiction of the particular matter which the judgement professes to decide.

9. *Fisher v. Pace,* 366 U.S. 155, 161-163 speaking to an attorney's duty.

It was thus the duty of counsel to abide by his decisions even if erroneous; and if the rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in a mockery of our trial courts and would destroy every concept of orderly process in the administration of justice.

10. *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418 at 450. If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are courts impotent, and what the constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." This power has been uniformly held to be necessary to the protection of the Court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgements and orders necessary to the due administration of law and the protection of the rights of citizens."

    "Even if it be doubtful whether a court has jurisdiction of a case, it has jurisdiction, until its judgement declining jurisdiction is announced, and willful disregard of those orders constitutes contempt."

11. *United States v. United Mine Workers of America,* 330 U.S. 258, 290-292, 293
    "It is for the Court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher Court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

12. *Barsh v. Mullins,* 338 P.2d 845, 847, 850, 855:
    It is not necessary for us to determine whether the liability of

a non-acting conspirator would be primary or derivative in a case where the object of the conspiracy was to cause damage to the person injured. *It may be that in such case the non-acting conspirators would be considered guilty of advising the commission of the tort which caused the injury, and to that extent would be liable as if they had committed the act with their own hands.*

13. *Thomas Fruit Co. v. Levergood,* 135 Okl. 105 — Attorney and Client:
"... where the attorney is actuated by malicious motives or shares the illegal motives of his client he becomes responsible."

CERTIFICATE OF MAILING

This undersigned hereby certifies that a true & correct copy of the foregoing instrument was mailed to opposing counsel on record on the 7 day of May 19 80

E. W. Shaffer

Receipt # 047455

Supreme Court, U. S.
FILED
JUN 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1786

IN THE
Supreme Court of the United States
TERM, 1980

EARL DAVID SHAFFER,

Petitioner-Appellant,

vs.

JAY R. BOND,

Respondent-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June, 1980.

PIP, Inc. (405)232-6494

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IN THE
SUPREME COURT OF THE UNITED STATES
TERM, 1980

No. 79-1786

EARL DAVID SHAFFER,

Petitioner-Appellant,

vs.

JAY R. BOND,

Respondent-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner is petitioning this Court for review of the disposition of his cause of action against respondent by the Oklahoma Courts. On March 15, 1978, Judge Harold C. Theus, District Judge of the District Court of Oklahoma Country, Oklahoma, sustained respondent's Motion for Summary Judgment and entered judgment in favor of the respondent and against the petitioner. The Court of Appeals of the State of Oklahoma (Division No. 1) affirmed the District Court's judgment by Order dated October 30, 1979. On December 18, 1979, petitioner's Petition for Rehearing was denied by the Court of Appeals. Subsequently on February 11, 1980, petitioner's Petition

for Writ of Certiorari was denied by the Supreme Court of the State of Oklahoma. Petitioner has now filed his Petition with this Court.

STATEMENT OF FACTS

This litigation is an outgrowth of a series of legal actions in numerous courts and jurisdictions relating to the divorce and child custody problems between the petitioner and his former wife, Mrs. Sue Ellen May. Respondent herein is an attorney who represented Mrs. May during a portion of this prior litigation against the petitioner. The issues involved in that litigation were ultimately determined by the Oklahoma Supreme Court in an order dated June 16, 1975, and appended to petitioner's Petition herein as Exhibit "C". That Order resolved the custody issue in favor of Mrs. May based on a finding that the lower Court which had granted temporary custody to petitioner Shaffer was without jurisdiction to act. Said Order of the Oklahoma Supreme Court was never appealed and subsequently became final and the issues therein res judicata.

Subsequently, on October 26, 1976, petitioner initiated this present action in Oklahoma County District Court alleging legal malpractice and conspiracy on the part of the respondent. The basis of petitioner's allegation was that certain legal advice which respondent allegedly gave to his client, Mrs. May, during the pendency of the prior custody suit was in violation of a duty which respondent owed to petitioner under the District Court's order granting temporary custody to petitioner. Since said order had been held null and void by the Oklahoma Supreme Court over two years prior to the filing of this action, the Oklahoma District Court granted summary judgment and the Court of Appeals affirmed, ruling that under Oklahoma law no rights can arise under a void order. (See

Exhibit "D" to Petition for Writ of Certiorari).

ARGUMENT AND AUTHORITIES

Petitioner continues in his Petition for Writ of Certiorari, as he has done throughout this litigation, to assert and attempt to relitigate the issues involved in the prior custody action. Respondent would call the Court's attention to those issues set out as questions for review by this Court in petitioner's Petition for Writ of Certiorari, specifically Nos. 1, 2, 3 and 11 (pp. 2 and 3 of Petition), all of which questions have been previously determined by the Oklahoma Supreme Court in the order which was not appealed and said issues have become res judicata and do not provide a proper basis for review by this Court.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257. Apparently, the constitutional issue which petitioner relies upon is an alleged violation of his constitutional right to due process under the Fourteenth Amendment. However, none of the eleven issues presented in the Petition for Writ of Certiorari involve due process under the United States Constitution or in any way constitue a substantial federal question. Although petitioner attempts to couch these issues in terms of equal protection and due process, he wholly fails to state a constitutional basis for review by this Court as required by 28 U.S.C. § 1257 and the cases construing this section.

Rather, the eleven questions for review set out in the Petition for Writ of Certiorari make it clear that petitioner is simply objecting to the fact that the Oklahoma Courts in interpreting and applying the Oklahoma law arrived at what petitioner considers incorrect conclusions which resulted in the granting and affirming of summary judgment in favor of the respondent and against the petitioner. Petitioner states that the Oklahoma Courts have "completely disregarded the law" and that the

Oklahoma Courts have subjected him to "gross injustice" (Petition, p.7). Petitioner thus concludes that he is entitled to have his Petition granted, and these alleged injustices and errors reviewed by this Court.

However, in guaranteeing due process, the Fourteenth Amendment does not guarantee immunity from judicial error. *Stein v. New York*, 346 U.S. 165, 97 L.Ed. 1522, 73 S.Ct. 1077. This rule that an erroneous decision does not necessarily deny due process has been applied specifically to errors of a State Court in interpreting and applying the laws of that state. See *Howard v. Kentucky*, 200 U.S. 164, 50 L.Ed. 421, 26 S.Ct. 189. Therefore, even if the Oklahoma Courts erred in their rulings as alleged by petitioner, such alleged errors of law do not provide a basis for the Court to review those decisions.

Furthermore, the mere fact that petitioner has been unsuccessful in the Oklahoma Courts does not indicate that there has been a violation of the due process of law guarantee. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 82 L.E. 268, 58 S.Ct. 185. If there has been a full hearing or opportunity for hearing, there is no necessary violation of the guarantee. *Goltra v. Weeks*, 271 U.S. 536, 70 L.Ed. 1074, 46 S.Ct. 613. Petitioner was given every opportunity for hearing provided for by Oklahoma law and Court Rules, and his allegations to the contrary are the result of his misunderstanding of his rights and the legal processes which protect those rights.

Petitioner alleges that he was denied the right to a fair trial and due process because of a biased judiciary. Although he does not so specifically state in his Petition, on prior appeals petitioner has cited failure of the District Court Judge to disqualify himself upon petitioner's request as the basis for this allegation. However, the procedure for disqualification of a judge is set out clearly in Rule 15 of the Rules for District Courts of Oklahoma, 12 O.S. Ch. 2 App.

This rule states that a party aggrieved by the refusal of a judge to grant a motion to disqualify may represent his motion to the chief judge following a written request for rehearing within ten (10) days from the date of the adverse order. Copies of such request are to be mailed to the chief judge, the adverse party and the judge who entered the original order. If the hearing before the chief judge results in an adverse order to the movant, the movant has ten (10) days in which to file a writ of mandamus in the Supreme Court. The Rule further states that unless these procedures are complied with, the Supreme Court will not entertain such an original proceeding to disqualify a judge.

Petitioner has appended to his Petition no order of the Supreme Court of Oklahoma regarding his Motion to Disqualify. This is because the petitioner failed to follow this required procedure to effect the disqualification of the judge and the issue was never properly before the Oklahoma Supreme Court and cannot therefore be properly raised before this Court. Furthermore, this issue raises no federal question so as to provide a basis for review by this Court.

Petitioner has also claimed that he was denied his right to a jury trial because the trial court sustained respondent's Motion for Summary Judgment. However, it is well recognized that a party is entitled to have a jury trial only where there are controverted facts to be determined by the jury, and where there is no substantial controversy as to any material facts, and any party is entitled to judgment as a matter of law, the Court should render such judgment. Rule 13 of the Rules for District Courts of Oklahoma, 12 O.S. Ch. 2 App. This Rule is also recognized by Rule 56 of the Federal Rules of Civil Procedure.

Petitioner additionally alleges that he was denied his right to a court reporter as set out at 20 O.S. § 106.4 (b). The Oklahoma Supreme Court has previously construed this

statute in *Weeks v. Wedgewood Village, Inc.*, 554 P.2d 780 (Okl. 1976) holding that the failure of a court reporter to transcribe the alleged proceedings at a hearing on defendant's Motion for Summary Judgment does not result in a denial of due process where there were no proceedings held, except appearances and no evidence was taken. Petitioner has previously admitted in his brief in the Oklahoma Supreme Court that there were in effect no proceedings held at the time of his request for a court reporter, except the appearances of the parties and that no argument was heard or evidence presented so as to entitle the petitioner to a court reporter (Brief in Chief of appellant, at p.2). Therefore, under the construction of the Oklahoma Statues by the Oklahoma Supreme Court, no denial of due process was effected by failure of the Court to provide a court reporter. Furthermore, such an issue does not constitute a federal question so as to grant this Court jurisdiction since it involves the construction of a state statute by the highest court of the state.

CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied this Court for the reason that the record as set out in the Petition fails to show affirmatively that any real or substantial federal questions were involved in the decision of the State Courts and for the further reason that a number of the issues set out in the Petition are res judicata.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT-APPELLEE.

This is to certify that on this 23rd day of June, 1980, a true and correct copy of the above and foregoing was mailed to Earl David Shaffer, 709 Northwest 89th Street, Oklahoma City, Oklahoma 73114, Petitioner Pro Se.

Earl D Mills